No. 96-1707

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In The

Supreme Court of the United States

October Term, 1996

TEXAS MANUFACTURED HOUSING ASSOCIATION, INC. and A.J. WALLER, SR.,

Petitioners,

vs.

CITY OF NEDERLAND and ZONING BOARD OF APPEALS OF THE CITY OF NEDERLAND,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONERS

D. BRENT WELLS
Counsel of Record
JAMES E. CUELLAR
WELLS & HENRY, P.C.
Attorneys for Petitioners
440 Louisiana, Suite 718
Houston, Texas 77002
(713) 222-1281

70985 (800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21 Lutz Appellate Services, inc.

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Petitioners herewith submit their Reply to Respondents' Brief in Opposition, as follows:

I.

WHERE A MUNICIPALITY'S REGULATORY SCHEME HAS THE EFFECT OF ENCROACHING UPON AN AREA EXPRESSLY RESERVED BY CONGRESS, A SHOWING THAT THE MUNICIPALITY INTENDED TO CREATE THE EFFECT IS NOT A NECESSARY ELEMENT OF A PREEMPTION VIOLATION.

One question presented to this Court is whether "bad motive" is a necessary element of a preemption violation. This Court has never been called upon to decide this question, a point which Respondents completely ignored in favor of arguing this case on the merits. In most preemption cases, the issue of intent is largely superfluous, and the primary issue at trial is whether the actions taken by the offending party fall within the scope of the preemption. This case is unusual because there is no dispute about the scope of 42 U.S.C. § 5403(d).[1] Instead, an issue presented by this appeal is whether an aggrieved party must show that the particular effects which give rise to a preemption claim were specifically *intended*. In the context of this case, the Fifth Circuit put the question thusly: did Nederland *intend* for its regulatory scheme to have the effect of imposing the local building code on HUD-certified manufactured housing? Petitioners maintain that intent is irrelevant in preemption analysis, and that even the legitimate exercise of the police power must be curbed if the regulation under review has the same effect as purposeful encroachment upon an area reserved by Congress.

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1. Respondents apparently concede that § 5403(d) is violated if a municipality explicitly requires all housing structures to meet the local building code. *See, e.g., Scurlock v. City of Lynn Haven, Fla.*, 858 F.2d 1521 (11th Cir. 1988).

Respondents added little, if anything, to this discussion. They merely assume that "bad motive" is a necessary element of a preemption violation, and, to show that Nederland lacks the requisite intent, they claim that Nederland's exclusion of HUD-certified manufactured housing is not motivated by factors which come within the exclusive domain of Congress (*i.e.*, safety, construction). Ultimately, it will be for this Court to decide whether "bad motive" is truly necessary to establish a preemption violation.

Respondents spent the remainder of their Brief arguing this case on the merits. They did so primarily by attacking the factual premise which underlies Petitioners' preemption claim, *viz.*, that the only meaningful distinction between a HUD-certified manufactured home and a "modular" home is the standard to which each is constructed.[2] Respondents took exception to this premise, labelling it as a "misstatement of fact" (p. 3). According to Respondents (p. 3), there are allegedly two other features which distinguish a HUD-certified manufactured home from a modular home: a HUD-certified manufactured home (1) is built on a permanent chassis; and (2) is therefore mobile. The chassis feature, however, is not unique to manufactured housing and, therefore, cannot truly be considered a "distinguishing" characteristic. There is no law — state or federal — which prevents a modular home from being built on a permanent chassis. As early as 1976, the Department of Housing and Urban Development recognized "that some structures that have traditionally been considered to be modular homes are now sometimes being manufactured with and transported on

2. Strangely, Respondents chastise Petitioners (p. 3) for failing to cite evidence in support of this premise even though (1) the premise as worded here is taken virtually verbatim from the Affidavit of Will Ehrle, President and General Counsel of Petitioner Texas Manufactured Housing Association, Inc., which Affidavit was submitted as part of Petitioners' summary judgment evidence (R. 701, 703); and (2) Respondents do not deny the claim that the two types of factory-built housing can be visually indistinguishable.

permanent chassis similar to those used to transport [manufactured] homes." 41 Fed. Reg. 24,968 (1976). The second feature, mobility, is also not a black-and-white issue. Many manufactured homes, including the one proposed by Mr. Waller in this case (R. 715), are installed on the same types of *permanent* foundation systems utilized for modular housing. When a manufactured home is installed in such a manner, it has the same degree of permanence as a modular home.

Petitioners' preemption claim is that Nederland's exclusion of HUD-certified manufactured housing, when combined with its ready acceptance of modular housing,[3] has the *effect* of linking its acceptance of factory-built housing upon compliance with the local building code, a requirement which is tantamount to imposing a different building code on HUD-certified manufactured housing in violation of § 5403(d). Respondents seem to argue that Nederland, in the exercise of its power to zone, has the unfettered right to exclude HUD-code manufactured homes from individual lots, even if the exclusion stems from a preference for structures built to the locally sanctioned building code. However, Nederland's right to regulate HUD-code manufactured homes is subordinate to the broad purposes of the National Manufactured Housing Construction and Safety Standards Act of 1974 (NMHCSSA), 42 U.S.C. § 5401 *et seq.* Under NMHCSSA, Congress placed the entire manufactured housing industry under HUD's control and superintendence. In contrast to Respondents' characterization of NMHCSSA as merely a safety initiative, Senator Bill Brock, NMHCSSA's sponsor, declared that the "thrust" of NMHCSSA is to "promot[e] the use of the [manufactured] home as a low cost, desirable form of housing." 118 Cong. Rec. 17,217 (1972).

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3. Nederland's acceptance of modular housing is particularly egregious since the broad definition of "trailer coach" in Ordinance 259 (App. B, 4a) draws no distinction between modular housing and manufactured housing and arguably applies to *both* types of factory-built housing.

This broad policy statement has recently been reaffirmed by HUD. In January 1997, HUD issued its *Notice of Internal Guidance on Preemption*, 62 Fed. Reg. 3456 (1997). In the *Notice*, HUD declared that

> a locality cannot accept structures meeting the Federal definition of manufactured homes which comply with different standards, such as the local or State Building Code, and exclude or restrict manufactured homes that are aesthetically the same but only meet the Federal standards. By excluding or restricting only manufactured homes built to the Federal standards, and accepting manufactured homes built to other codes, the locality is establishing standards different than the Federal standards.

62 Fed. Reg. 3457 (1997). This position was amplified in HUD's Statement of Policy 1997-1, which was published ten days after Petitioners submitted their Petition: "a locality cannot exclude or restrict manufactured homes that meet the Federal standards if the locality accepts manufactured homes meeting other standards." 62 Fed. Reg. 24338 (1997).

The position taken by HUD on the scope of § 5403(d) is supported by decisions from various federal courts. *See, e.g., Scurlock v. City of Lynn Haven, Fla.*, 858 F.2d 1521 (11th Cir. 1988) (local requirement that all housing structures must meet the local building code is tantamount to imposing different construction standards on HUD-code manufactured homes in violation of § 5403(d)).[4]

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4. Respondents contend (p. 8) that this case is distinguishable from *Scurlock v. City of Lynn Haven, Fla.*, 858 F.2d 1521 (11th Cir. 1988). They (Cont'd)

Nederland's ordinance, as enforced, has the effect of imposing a different set of construction standards on HUD-code manufactured housing in violation of § 5403(d), an effect that replicates the effect caused by an ordinance which facially requires all housing structures either to meet the local building code or suffer exclusion. That this effect is unintended should be irrelevant where the supremacy of federal law is at stake.

(Cont'd)
argue that, in *Scurlock*, the only impediment to siting a HUD-code manufactured home on a privately owned lot was an ordinance which required all structures to be built to the local building code. Here, Respondents assert, the Fifth Circuit found other "impediments" in the form of "other applicable local regulations" (App. B, 11a). According to the Fifth Circuit, even if a HUD-code manufactured home complies with the local building code, it still cannot be placed on a privately owned lot in Nederland because Ordinance 259 excludes HUD-code manufactured homes in such areas (App. B, 11a). Since Ordinance 259 itself is being challenged as effectively linking the issue of acceptance/exclusion to compliance with the local building code, the Fifth Circuit's reasoning is entirely circular.

Oddly, the Fifth Circuit's opinion (App. B, 11a) can also be read to suggest that the summary judgment evidence somehow fails to prove what all parties readily acknowledge, *viz.*, that Nederland's building code, in fact, differs from the HUD code. This point has never been in dispute. In their depositions, the transcripts of which were submitted by Petitioners as part of their summary judgment evidence, Nederland officials testified that HUD-code manufactured homes do not meet the local building code (R. 1643-44, for example). Petitioners also commissioned a side-by-side comparison of Nederland's building code (the Standard Building Code) and the HUD code. The 177-page study, too, was submitted as part of Petitioners' summary judgment evidence (R. 892-1069).

II.

WHERE A FACIALLY NEUTRAL STATUTE DISCRIMINATES AGAINST INTERSTATE COMMERCE IN ITS PRACTICAL EFFECT, PROOF OF PROTECTIONIST INTENT IS NOT REQUIRED IN ORDER TO ESTABLISH DISCRIMINATION UNDER THE DORMANT COMMERCE CLAUSE.

Another question presented to this Court is whether discrimination that is not motivated by protectionist intent still qualifies as discrimination for purposes of the Dormant Commerce Clause.[5] Respondents disagree (p. 14), but they cannot escape the fact that the Fifth Circuit is looking for "something more" when it holds that conduct which otherwise fits the discrimination model articulated in *Oregon Waste Systems, Inc. v. Dept. of Environmental Quality*, 511 U.S. 93, 99 (1994), does not qualify as discrimination under the Dormant Commerce Clause. That the Fifth Circuit is looking for protectionist intent is revealed each and every time the court refers to Ordinance 259 as merely a "land use" regulation as opposed to, say, a local measure aimed at giving a competitive advantage to the local modular homebuilding industry.

In another attempt to argue this case on the merits at the petition stage, Respondents assert (pp. 12, 15, 18) that Petitioners failed to show that, in response to Nederland's exclusion of HUD-code manufactured homes from individual lots,

5. This Court has never been called upon to decide this question. Respondents disagree (pp. 11-12), citing *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981). While it is true that Minnesota's ban on plastic milk containers was motivated by non-protectionist reasons, this Court found that the ban was not discriminatory. It goes without saying that the absence of discrimination in *Clover Leaf* made unnecessary any determination of the types of discrimination, if any, which are not actionable under the Dormant Commerce Clause.

prospective buyers would turn to products generated by an intrastate industry. On the contrary, Petitioners showed that (1) prospective buyers of HUD-code manufactured homes could and would turn to modular housing;[6] and (2) in Texas, the modular housing industry is an in-state industry. Respondents take exception to this latter characterization, even though the only *evidence* on this point was submitted by Petitioners.[7]

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6. Curiously, this point was disputed, not by Respondents, but by the Fifth Circuit, which speculated that HUD-code manufactured homes and modular homes do not compete for the same customers because modular homes are generally more expensive. 101 F.3d at 1103 (App. B, 18a). This conjecture is contradicted by the affidavit testimony of Waldo Luedemann, Petitioners' expert, who testified that HUD-code manufactured homes and modular homes are sold side-by-side at the same retail establishments (R. 772). Furthermore, the Fifth Circuit's argument is of limited utility since some buyers can afford *both* types of homes (R. 832-43).

Finally, Petitioners do not have to prove, as the Fifth Circuit suggests, that a "restriction on HUD-code manufactured homes will result in a corresponding increase in sales of modular homes." 101 F.3d at 1103-04 (App. B, 18a). As was pointed out recently by this Court in *Camps Newfound/ Owatonna, Inc. v. Town of Harrison, Me.*, __ S.Ct. __, 1997 WL 255351 *10 n.15 (1997), demanding this level of cause-and-effect precision "misconstrues the proper analysis."

7. In his Affidavit which was submitted as part of Petitioners' summary judgment evidence, Will Ehrle, the President and General Counsel of Petitioner Texas Manufactured Housing Association, Inc., testified that the modular housing industry in Texas is an *intrastate* industry: the modular homes being purchased by Texas consumers are built exclusively in Texas (R. 701).

III.

WHERE THERE IS EVIDENCE OF A BURDEN ON INTERSTATE COMMERCE AND LESS BURDENSOME ALTERNATIVES TO ACHIEVE THE STATE'S PURPOSE, SUMMARY JUDGMENT IS INAPPROPRIATE TO DISPOSE OF A DORMANT COMMERCE CLAUSE CHALLENGE.

Respondents failed to address another question presented to this Court, *viz.*, whether the intensely factual nature of the third component of the undue burden test articulated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) — the availability of less burdensome alternatives — makes summary disposition wholly inappropriate.[8] Doubtless, the *Pike* test requires courts to make quasi-legislative policy decisions. *See Camps Newfound/ Owatonna, Inc. v. Town of Harrison, Me.*, __ S.Ct. __, 1997 WL 255351 *28-29 (1997) (Thomas, J., dissenting). Since they are making policy decisions, some courts are content to do the requisite balancing at the summary judgment level, while others are reluctant to do so without a fully developed record.[9] This

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8. Incredibly, Respondents maintain (pp. 17-18) that the Fifth Circuit applied the *Pike* test correctly, even though the Fifth Circuit failed to analyze whether Nederland has other ways to maintain property values without burdening interstate commerce.

9. Although Respondents disagree, the cases cited by Petitioners support the proposition that some courts of appeals are reluctant to make any type of policy decision at the summary judgment level. For example, in *Blue Circle Cement, Inc. v. Board of County Commissioners, etc.*, 27 F.3d 1499 (10th Cir. 1994), the court acknowledged that the "putative local interest [ ] is the health and safety of the County's residents." *Id.* at 1512. Armed with this purpose, the court nevertheless refused to make a policy decision, finding that "the record [ ] is inadequate to support a summary judgment for the Board." *Id.* Similarly, in *Cotto Waxo Company v. Williams*, 46 F.3d 790 (8th

(Cont'd)

Court should establish a uniform procedure for federal courts to follow when applying the *Pike* test.

Finally, Respondents contend (p. 13) that the *Pike* undue burden test is a "rational basis review balancing test." This statement, of course, has no support in the law.[10]

CONCLUSION

The petition for a writ of certiorari should be granted for the reasons stated therein and hereinabove.

Respectfully submitted,

D. BRENT WELLS
Counsel of Record
JAMES E. CUELLAR
WELLS & HENRY, P.C.
Attorneys for Petitioners
440 Louisiana, Suite 718
Houston, Texas 77002
(713) 222-1281

(Cont'd)
Cir. 1995), the court, after acknowledging the benefits and burdens of the challenged statute, found that summary judgment was inappropriate and held that "[t]he constitutionality of the Act should be tested at trial." *Id.* at 795.

10. *See City of New Orleans v. Dukes*, 427 U.S. 297, 304 n.5 (1976) (unlike equal protection and due process analysis, "[v]ery different principles" are used "when constitutional provisions such as the Commerce Clause are implicated"). The rational basis test does not involve any "balancing" at all; instead, the courts merely discern whether any legitimate purpose could "conceivably" be served by the legislative action under review. In contrast, the *Pike* test requires courts to make quasi-legislative policy decisions. *See Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, __ S.Ct. __, 1997 WL 255351 *28-29 (1997) (Thomas, J., dissenting).